its neighbors have long sworn by, if the rule is not vicious, than to have it declare and uphold a rule possibly more logically in accord with some of the antique land laws. H. J. C.

---

WHAT CONSTITUTES "BEING ON DUTY" UNDER THE HOURS OF SERVICE ACT.—The Federal HOURS OF SERVICE ACT of 1907 (34 Stat. at L. 1415, Comp. St. 1913, §§ 8677-8680) provides, in part, that it shall be "unlawful for any carrier * * * to require or permit any employe * * * to be or remain on duty for a longer period than sixteen consecutive hours;" with the further proviso in § 2: "Provided that no operator, train dispatcher, or other employe, who, by the use of telephone or telegraph dispatches, receives or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day * * *." A proviso is also stated, excusing such overtime service in case of "emergency, unavoidable accident, or act of God." In the recent case of *Oregon Short Line R. Co.* v. *United States*, 234 Fed. 584, the Circuit Court of Appeals for the Ninth Circuit held that the defendant company was liable to the penalties imposed by this Act, even though the company had expressly forbidden and prohibited its telegraph operator to work more than nine hours, and he, in violation of said instructions, put in three hours overtime without the company's knowledge, and not as an operator, but at clerical work; that Congress had originally inserted the word "knowingly" before the word "permitted," but had later stricken it out, thereby showing the intention that the act should cover exactly such a case as that before the court; that the defendant was charged with knowledge of the acts of its servants; and that under any other view the manifest purpose of the statute would be defeated, as convictions would under such circumstances be practically impossible.

As the Circuit Court of Appeals points out, the purpose of the HOURS OF SERVICE ACT is not penal, but remedial—to protect not only the employes of the railroads, but to protect also the safety of the public; and the courts have kept this purpose in view in their interpretation of the ACT and in their definition of its terms, as will appear from an examination of the cases that have arisen under the ACT.

Thus the carrier cannot avoid the provision against requiring or permitting an employe from remaining on duty for a "longer period than nine hours in any twenty-four-hour period" by dividing the hours of service into two periods, if the aggregate hours of service each day of twenty-four hours exceed nine hours. *U. S.* v. *St. Louis Southwestern Ry. Co. of Texas*, 189 Fed. 954. As to the possibility of breaking up the period of service, THORNTON summarizes the authority as follows: "The time can be divided, provided such break is bona fide and customary; the term "period" does not mean a cycle, or something continuous, as Congress had no intention of overriding such well known customs." THORNTON, FEDERAL EMPLOYER'S LIABILITY AND SAFETY APPLIANCES ACTS, (2 ed. § 246. In *U. S.* v. *Northern Pacific R. Co.*, 213 Fed. 539, it was held that a lay-off of a train crew for one and one-half hours by

a superior while the train was held to permit superior trains to meet and pass, did not break the continuity of the service, but must be counted in the reckoning of sixteen hours. This decision was due to the fact that the necessity of such delay is not within the term "emergency," and also that such a lay-off was not bona fide. On the other hand, a lay-off of three hours at noon by an authorized superior was held to be bona fide, as it was customary, and gave the employee a real opportunity for rest and recuperation. The court furthermore said that this interpretation would not open the way to the abuse of working a man, say one hour in every three, thus giving him no real opportunity for rest and recuperation, as such cases would be covered by the provision that "all employes have at least eight consecutive hours off duty in each day, counting from some point in the next day." *Atchison, T. and S. F. Ry. Co.* v. *U. S.*, 117 Fed. 114. So also in *Southern Pacific Co.* v. *U. S.*, *222* Fed. 46, 137 C. C. A. 584, it was held that such a lay-off is bona fide, even during delay of a train, if it gives time for a substantial and opportune period of rest. The period of service cannot be broken by the crew itself, but only by order of a superior, as shown by the case of *Denver & R. G. Ry. Co.* v. *U. S.*, 233 Fed. 62, in which the crew, after a derailment, retired to a farm house for food and rest, leaving the engine in charge of a watchman, until the arrival of the derrick, there being no superior present to release them. The period of rest was consequently counted in as part of the sixteen-hour period of service.

As regards the phrase "office continuously operated night and day," it has been held that an office required to be kept open for business from 6:30 a. m. to 10:30 p. m. is such an office, and no employe shall be permitted to work therein over nine hours per day. *U. S.* v. *Southern Pacific Co.*, supra.

An employe is held to be "on duty" even though inactive, where he is under orders, and liable to be called at any moment, or where he is at his post in obedience to the rules of his superior whether actually at work, or simply awaiting orders. *Missouri, K. & T. Ry. Co.* v. *U. S.*, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed., *U. S.* v. *Chicago & P. S. Ry. Co.*, 195 Fed. 783.

It is also settled that the words "other employe" in § 2—"Provided that no operator, train dispatcher, or other employe who, by the use of telephone or telegraph dispatches, receives or delivers orders pertaining to or affecting train movements—etc." do not include train conductors. *U. S.* v. *Florida East Coast Ry. Co.*, *222* Fed. 46, 137 C. C. A. 571.

And now as to what causes of train delay are held to constitute "emergencies, unavoidable accidents, or acts of God." It is held that while the terms do not include the ordinary accidents incidental to good railroading, a derailment is not incidental to good railroading, and the crew of a derailed train may be required to remain on duty for more than sixteen hours, and the company not be liable. *U. S.* v. *Northern Pacific Co.*, *215* Fed. 64. Furthermore, it makes no difference whether the derailment was the result of the defendant's negligence or not. The question is not how the accident was brought about, but, having occurred, how can the public best be protected, and the company is intended to be left free to meet the emergencies as the best interests of the public demand. So, too, the unforeseeable insub-

ordination of a fellow employe, or his death, or illness, may constitute an "emergency" within the meaning of § 2, however, justifying the retention of an operator overtime; and this regardless of the lack of justification for such insubordination. *U. S.* v. *Denver & R. G. Co.*, 220 Fed. 293, 136 C. C. A. 275; *U. S.* v. *Southern Pacific Co.*, 209 Fed. 562, 126 C. C. A. 384. In case of accident, the company is not deprived of the benefit of the proviso unless the accident was one which could have been foreseen and prevented by the exercise of the high degree of diligence demanded. Examples of such causes, deemed not sufficient to excuse the defendant, are: side-tracking for late train; running out of steam; hot box; unusually heavy movement of grain; high wind or storm causing delay, but not obstructions or breaks in the track. *U. S.* v. *Kansas City Southern Ry. Co.*, 202 Fed. 828, 121 C. C. A. 136; *Great Northern Ry.* v. *U. S.*, 218 Fed. 302, 134 C. C. A. 98. In case of wreck, if the crew is kept on duty wholly because of the derailment, the defendant is excused for the overtime service, but if they could have been relieved after the wreck by the exercise of due diligence, and were not, the benefit of the proviso is withdrawn from the company. *San Pedro L. A. & S. L. Ry. Co.* v. *U. S.*, 220 Fed. 737, 136 C. C. A. 43. In another instance, the dispatcher knew of a wreck on the line, but relied on a message from the wrecked train that the track would be cleared in thirty minutes, and sent out a waiting train. Due to delay in clearing the track, the crew of the latter train was kept on duty more than sixteen hours, and it was held that the over-time service was caused, not by the derailment, but by the order of the dispatcher, and that the latter should have waited for more trustworthy information, remarking that the "duty of the carrier to comply with the statute must be placed above its zeal to hasten transportation." H. R. H.

---

ADMISSIBILITY OF ARTICLES TAKEN FROM THE ACCUSED OR HIS PREMISES WITHOUT A SEARCH WARRANT.—In *Flagg* v. *United States*, 233 Fed. 481, an indictment for fraudulent use of the United States mails, the Circuit Court of Appeals for the Second Circuit held that incriminatory articles, papers, etc., taken from the defendant's place of business by municipal policemen, without a search-warrant, could not be used as evidence against him, because such action was violative of the Fourth and Fifth Amendments of the Federal Constitution.

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." The Fifth Amendment provides inter alia, that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

The defendant was arrested by the municipal patrolmen without a warrant and taken to the post office building where he was arrested under a warrant charging a violation of a criminal code protecting the use of the mails. At